

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NICOLE LOGAN, et al.,
Plaintiffs,

v.

WILLIAM WEATHERLY, DAN HARGRAVES;
RUBEN HARRIS; DON HERROF; and
ANDREW WILSON, et al.,
Defendants.

No. CV-04-214-FVS

ORDER RE: DEFENDANTS' MOTION
FOR RECONSIDERATION RE:
COURT'S ORDER DENYING IN PART
AND GRANTING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGEMENT RE:
PLAINTIFFS' STATE LAW CLAIMS

BEFORE THE COURT is Defendants' Motion for Reconsideration Re: Court's Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment Re: Plaintiffs' State Law Claims. (Ct. Rec. 395). Plaintiffs are represented by Darrell Cochran and Thaddeus Martin. Defendants are represented by Andrew Cooley, Stewart Estes, Kim Waldbaum and Richard Jolley.

I. BACKGROUND

This is a class action arising from the response of the City of Pullman Police Department to an altercation at the Top of China Restaurant and Attic Nightclub on September 8, 2002. The alleged facts are set forth in detail in the Court's Order Granting in Part and Denying in Part Defendants' Motion for Partial Summary Judgment Re: Qualified Immunity. (Ct. Rec. 240). Plaintiffs' Amended

ORDER RE: DEFENDANTS' MOTION FOR RECONSIDERATION RE: COURT'S
ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR
SUMMARY JUDGEMENT RE: PLAINTIFFS' STATE LAW CLAIMS - 1

1 Complaint asserts claims against the individual Defendant Officers
2 under Washington state law for assault (Complaint, ¶ 6.2), intentional
3 infliction of emotional distress or the tort of outrage (Complaint, ¶
4 6.3), and negligence (Complaint, ¶ 6.4), as well as claims against the
5 City of Pullman Police Department for negligence under a theory of
6 respondeat superior (Complaint, ¶ 6.4) and negligent training, hiring,
7 and supervision (Complaint, ¶ 6.5). See Ct. Rec. 137. Defendants
8 moved for summary judgment dismissal of these claims under Washington
9 state law. The Court entered an Order Denying in Part and Granting in
10 Part Defendants' Motion for Summary Judgment ("Order"). (Ct. Rec.
11 391). Specifically, the Court granted Defendants' motion for summary
12 judgment dismissal of Plaintiffs' claims for negligent supervision,
13 training and hiring. With respect to Plaintiffs' assault claims that
14 were not barred by the applicable statute of limitations, the Court
15 denied Defendants' motion for summary judgment. Further, the Court
16 denied Defendants' motion for summary judgment to the extent it sought
17 dismissal of Plaintiffs' claims for outrage and negligence.
18 Defendants now move for reconsideration of the Court's Order as it
19 pertains to Plaintiffs' assault claims and negligence claims.

20 **II. DISCUSSION**

21 Defendants seek reconsideration of the Court's Order on two
22 specific grounds: (1) whether Plaintiffs' negligence claims are barred
23 by the public duty doctrine; and (2) whether the doctrine of
24 transferred intent is applicable to Plaintiffs' assault claims.

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1 **A. Standard of Review**

2 The Federal Rules of Civil Procedure do not mention a "motion for
3 reconsideration." Even so, a motion for reconsideration is treated as
4 a motion to alter or amend judgment under Rule 59(e) if it is filed
5 within ten days of entry of judgment. *United States v. Nutri-Cology,*
6 *Inc.*, 982 F.2d 394, 397 (9th Cir.1992). Here, Defendants timely filed
7 their motion for reconsideration. Thus, it is within the Court's
8 discretion to reconsider its Order. See *School Dist. No. 1J,*
9 *Multnomah County, OR v. AcandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir.
10 1993). Accordingly, the Court exercises its discretion and will
11 reconsider its Order Denying in Part and Granting in Part Defendants'
12 Motion for Summary Judgment Re: Plaintiffs' State Law Claims
13 ("Order").

14 **B. Negligence**

15 Plaintiffs' Amended Complaint alleges the individual Defendant
16 Officers were negligent because they: "(1) failed to communicate
17 knowledge of the social function at the Top of China between changing
18 shifts and plan for a controlled response to situations at the
19 function; (2) failed to plan and assess their response to the call for
20 assistance; (3) failed to establish physical presence at the scene,
21 verbalize a cease and desist order, and control the isolated
22 disturbance with as little force as possible; (4) failed to assess the
23 environmental conditions of the confined building before discharging
24 oleoresin capsicum; (5) discharged O.C. into a confined building
25 occupied by several hundred innocent persons; (6) failed to provide

1 for safe crowd control following intentional use of gas in the
2 building; and (7) failed to administer medical attention to or call
3 for a medical response on behalf of the victims." Court's Order, at
4 16 (internal quotations omitted) (citing Plaintiffs' Amended
5 Complaint, ¶¶ 6.4.1 - 6.4.7.). The Court concluded that whether "the
6 Officers exercised the ordinary care or such care as a reasonable
7 person would have exercised under the same or similar circumstances
8 ... raised issues of material fact with respect to whether the
9 Officers were negligent." Court's Order, at 16. On that basis, the
10 Court denied Defendants' motion for summary judgment on Plaintiffs'
11 negligence claims.

12 Defendants move for reconsideration, arguing Plaintiffs'
13 negligence claims against the individual Officers are barred by the
14 public duty doctrine. Additionally, now that the City of Pullman
15 Police Department has been dismissed from this action, Defendants
16 request the Court dismiss the negligence claims against the Pullman
17 Police Department, which are based on the doctrine of respondeat
18 superior. See Amended Complaint, ¶ 6.4.

19 **1. City of Pullman Police Department**

20 Plaintiffs argue the City of Pullman is still a proper defendant
21 for Plaintiffs' state law causes of action because the Court's Order
22 Granting Defendants' Motion for Judgment on the Pleadings (Ct. Rec.
23 426) only dismissed the City of Pullman Police Department, not the
24 City of Pullman. However, the City of Pullman is not a named party in
25 this action. Plaintiffs correctly note that when the *Logan and Arnold*

1 cases were consolidated, the Court's Order indicated that the City of
2 Pullman was a proper remaining defendant. At that time, the Court's
3 statement was true because although the *Arnold* complaint did not name
4 the City of Pullman as a defendant, the *Logan* complaint did name both
5 the City of Pullman and the City of Pullman Police Department as
6 defendants. However, Plaintiffs later sought and obtained permission
7 to file an Amended Complaint in this consolidated action. Plaintiffs'
8 Amended Complaint (Ct. Rec. 137) does not name the City of Pullman.
9 Rather, the Amended Complaint only names the "City of Pullman Police
10 Department; William T. Weatherly; Dan Hargraves; Ruben Harris; Don
11 Heroff; and Andrew Wilson." Consequently, the City of Pullman was
12 terminated as a party defendant in this case.

13 An "amended complaint supersedes the original, the latter being
14 treated thereafter as being non-existent." *Forsyth v. Humana, Inc.*,
15 114 F.3d 1467, 1474 (9th Cir. 1997). Because the City of Pullman was
16 not named in Plaintiffs' Amended Complaint, the City of Pullman is not
17 a party in this action. Accordingly, since the Pullman Police
18 Department has been dismissed from this action, the only remaining
19 negligence claims include Plaintiffs' claims against the individual
20 Defendant Officers.

21 **2. Public Duty Doctrine**

22 "Under the public duty doctrine, no liability may be imposed for
23 a public official's negligent conduct unless it is shown that the duty
24 breached was owed to the injured person as an individual and was not
25 merely the breach of an obligation owed to the public in general

1 (i.e., a duty to all is a duty to no one)." *Taylor v. Stevens County*,
2 111 Wash.2d 159, 163, 759 P.2d 447 (1988). Defendants argue summary
3 judgment should be granted on Plaintiffs' negligence claims because
4 Plaintiffs failed to establish whether the Officers owed any duty of
5 care to each of the individual Plaintiffs under their multiple
6 negligence theories. In response, Plaintiffs argue Defendants should
7 be prohibited from seeking summary judgment under the public duty
8 doctrine because Defendants never specifically raised this issue in
9 their original motion for summary judgment. Alternatively, Plaintiffs
10 argue the public duty doctrine is not applicable to the facts of this
11 case.

12 Although Defendants did not specifically address the issue of the
13 public duty doctrine in their original motion for summary judgment,
14 they did argue Plaintiffs had failed to establish that the Defendant
15 Officers owed any specific duty to Plaintiffs. In its Order, the
16 Court concluded the Defendants had withdrawn their motion for summary
17 judgment with respect to Plaintiffs' negligence claims because
18 Defendants did not mention it in their reply brief. However,
19 Defendants contend they didn't address the issue in their reply brief
20 because Plaintiffs failed to meet their burden of proving the
21 existence of a duty. Defendants now state they "regret not better
22 explaining this position" but urge the Court to consider the issue now
23 on Defendants' motion for reconsideration.

24 The Court recognizes that its Order never specifically addressed
25 what "duty" the Officers owed the Plaintiffs. Since the first hurdle
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1 in any negligence action is establishing a duty[,]” *Bratton v. Welp*,
2 145 Wash.2d 572, 576, 39 P.2d 959 (2002), prior to trial the Court
3 will necessarily have to make a determination as to the applicability
4 of the public duty doctrine. Therefore, the Court concludes it is
5 appropriate and necessary to reconsider its Order and determine to
6 what extent Plaintiffs’ negligence claims are affected by the public
7 duty doctrine.

8 “The existence of a duty is a question of law, not fact. *Minahan*
9 *v. W. Wash. Fair. Ass’n*, 117 Wash.App. 881, 890, 73 P.3d 1019, 1024
10 (Div. 2, 2003); *Pedroza v. Bryant*, 101 Wash.2d 226, 228, 677 P.2d 166
11 (1984). A duty can arise either from common law principles or from a
12 statute or regulation. *Doss v. ITT Rayonier, Inc.*, 60 Wash.App. 125,
13 129, 803 P.2d 4, *rev. denied*, 116 Wash.2d 1034, 813 P.2d 583 (1991).
14 The public duty doctrine serves as a “framework” for courts to use
15 when determining when a public official owes a specific statutory or
16 common law duty to a plaintiff suing in negligence. *Cummins v. Lewis*
17 *County*, 133 P.3d 458, 462 (2006). “Under the public duty doctrine, no
18 liability may be imposed for a public official's negligent conduct
19 unless it is shown that the duty breached was owed to the injured
20 person as an individual and was not merely the breach of an obligation
21 owed to the public in general (*i.e.*, a duty to all is a duty to no
22 one).” *Taylor v. Stevens County*, 111 Wash.2d 159, 163, 759 P.2d 447,
23 449-450 (1988) (citation and internal quotations omitted). “There are
24 four common law exceptions to the public duty doctrine. If one of
25 these exceptions applies, the [public official] will be held as a

1 matter of law to owe a duty to the individual plaintiff or to a
2 limited class of plaintiffs." *Cummins*, 133 P.3d at 462 (internal
3 quotations and citations omitted). "The exceptions are (1)
4 legislative intent, (2) failure to enforce, (3) the rescue doctrine,
5 and (4) a special relationship." *Id.* at n. 7.

6 Here, Plaintiffs do not argue that an exception to the public
7 doctrine applies. Rather, Plaintiffs argue the public duty doctrine
8 is inapplicable to cases, such as this, where the negligence flows
9 from "actions as opposed to inactions." *See Coffel v. Clallam*, 47
10 Wash. App. 397, 403, 735 P.2d 686, 690 (Div. 2, 1987). ("The [public
11 duty] doctrine provides only that an individual has no cause of action
12 against law enforcement officials for failure to act. Certainly if
13 the officers do act, they have a duty to act with reasonable care.").
14 Thus, Plaintiffs argue that once the Officers decided to break up the
15 altercation at the Top of China Restaurant and The Attic nightclub by
16 taking affirmative action and discharging O.C. spray, the Defendant
17 Officers had a duty to act with reasonable care.

18 In *Coffel*, the owner (Mr. Coffel) and the tenant (Mr. Knodel) of
19 a commercial building brought suit against various county police
20 officers for failure of law enforcement to take action to prevent the
21 destruction of the building by Clinton Caldwell, a former owner of a
22 one-half interest in the building. *Coffel*, 47 Wash.App. at 398, 735
23 P.2d 686. The gist of the plaintiffs' claims was that the defendant
24 officers stood by while the plaintiffs' building and contents were
25 being destroyed by Mr. Caldwell and prevented plaintiffs from doing

1 anything about the destruction even though the officers knew of
2 plaintiff Coffel's claim of ownership and plaintiff Knodel's claim of
3 possession. *Coffel v. Clallam County*, 58 Wash.App. 517, 519, 794 P.2d
4 513 (Div. 2, 1990). The gist of the defense was that since there was
5 a civil dispute over ownership of the building, the officers were
6 under no duty to intervene and that, in any event, the public duty
7 doctrine shielded them from liability for their actions or failure to
8 act. *Id.* The court of appeals held that plaintiffs had stated a
9 cause of action for negligence by alleging the officers at the scene
10 acted affirmatively in preventing plaintiffs from protecting their
11 property against destruction. *Coffel*, 47 Wash.App. at 403-04, 735
12 P.2d 686. However, the court of appeals dismissed the negligence
13 claims against the officers who were present at the scene insofar as
14 they were based on "inaction" of the officers. *Id.* The court
15 remanded to the trial court for a determination of "whether
16 affirmative action was taken by [the] officers, and whether any action
17 taken was below the standard of reasonable care and whether such
18 action proximately resulted in damage to plaintiffs for which
19 defendants are liable." *Id.* at 405, 735 P.2d 686.

20 Under *Coffel*, Plaintiffs' claim that the Individual Defendant
21 Officers were negligent in dispersing O.C. spray inside the building
22 is not precluded by the public duty doctrine. However, the public
23 duty doctrine is still applicable to the remainder of Plaintiffs'
24 negligence theories which are based on allegations that the Officers
25 "failed" to act in some way. See Plaintiffs' Amended Complaint, at ¶¶

1 6.4.1-.4 (Plaintiffs "failed to communicate knowledge of the social
2 function", "failed to plan and assess their response", "failed to
3 establish physical presence at the scene", "failed to assess the
4 environmental conditions of the confined building before discharging"
5 O.C. spray) and ¶¶ 6.4.6 and 6.4.7. ("failed to provide for safe crowd
6 control following use of" O.C. and "failed to administer medical
7 attention to or call for medical response" for Plaintiffs). Thus,
8 these theories of negligence are not actionable because Plaintiffs
9 have failed to show any exception to the public duty applies.

10 ***B. Doctrine of Transferred Intent***

11 Defendants also move for reconsideration of the Court's Order, to
12 the extent it holds that the doctrine of transferred intent is
13 applicable to Plaintiffs' assault claims. In its Order, the Court
14 held that under the doctrine of transferred intent, "the officers'
15 intent with respect to those individuals who were directly sprayed by
16 O.C. transfers to all of the plaintiffs who were inside the building
17 when O.C. was sprayed." Order, at 8. Defendants argue the doctrine
18 of transferred intent has not been specifically adopted in civil cases
19 in Washington. In the alternative, Defendants argue that even if the
20 Court concludes the doctrine has been adopted in civil cases in
21 Washington, the doctrine is not applicable the facts in this case.

22 In holding that the doctrine was applicable to this civil case,
23 the Court's Order cited to *State v. Clinton*, 25 Wash.App. 400, 606
24 P.2d 1250 (1980), a criminal case wherein the defendant was convicted
25 of second-degree assault. The defendant taunted a husband to fight
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1 with him and began swinging a piece of pipe so violently that the pipe
2 left his hand, sailed past the husband and struck the wife. The court
3 held that an instruction on the doctrine of transferred intent was
4 appropriate and affirmed the defendant's conviction for second-degree
5 assault against the wife.

6 In contrast to the facts in *Clinton*, Defendants argue the
7 doctrine of transferred intent is not applicable to this case because
8 it is not a "shoot and miss" case. Instead, this is a case where the
9 Officers' alleged intended victims of the O.C. were actually sprayed
10 with O.C. In support of their argument, Defendants cite several cases
11 from other jurisdictions wherein courts that have adopted the doctrine
12 of transferred intent have specifically held that it does not apply to
13 the "shoot and hit" scenario. See e.g., *State v. Ford*, 625 A.2d 984,
14 997-998 (Md. 1993) (holding that where the crime intended has actually
15 been committed against the intended victim, transferred intent is
16 unnecessary and should not be applied to acts against unintended
17 victims). In response, Plaintiffs point to decisions from other
18 jurisdictions wherein courts have held that the doctrine of
19 transferred intent is applicable when a defendant kills an intended
20 victim as well as an unintended victim. See e.g., *Harvey v. State*,
21 111 Md.App. 401, 681 A.2d 628 (1996) (the doctrine of transferred
22 intent operates with full force whenever the unintended victim is hit
23 and killed; it makes no difference whether the intended victim is
24 missed; hit and killed; or hit and only wounded); *State v. Fennell*,
25 340 S.C. 266, 531 S.E.2d 512 (2000); *Ochoa v. State*, 115 Nev. 194, 981

1 P.2d 1201, 1205 (1999); *Mordica v. State*, 618 So.2d 301, 303
2 (Fla.Dist.Ct.App. 1993); and *State v. Worlock*, 117 N.J. 596, 569 A.2d
3 1314, 1325 (1990).

4 The Court determines the doctrine of transferred intent is
5 unnecessary to find the Officers assaulted those Plaintiffs who were
6 directly sprayed with O.C. and those Plaintiffs who suffered only
7 secondary effects. The Washington legislature has not defined
8 "assault" and thus Washington courts have turned to the common law for
9 its definition. *State v. Wilson*, 125 Wash.2d, 212, 217, 883 P.2d 320,
10 323 (1994). "Three definitions of assault are recognized in
11 Washington: (1) an attempt, with unlawful force, to inflict bodily
12 injury upon another [attempted battery]; (2) an unlawful touching with
13 criminal intent [actual battery]; and (3) putting another in
14 apprehension of harm whether or not the actor intends to inflict or is
15 capable of inflicting the harm [common law assault]. *Id.* (citing
16 *State v. Bland*, 71 Wash.App. 345, 353, 860 P.2d 1046 (1993)).
17 "Assault by battery does not require specific intent to inflict harm
18 or cause apprehension; rather battery requires intent to do the
19 physical act constituting assault. The other two forms of assault,
20 however, require specific intent that the defendant intended to
21 inflict harm or cause reasonable apprehension of bodily harm." *State*
22 *v. Hall*, 104 Wash.App. 56, 62, 14 P.3d 884, 887 (Div. 3, 2000)
23 (internal citation omitted). Here, Plaintiffs don't rely on the
24 assault by battery definitions. Rather, Plaintiffs appear to rely on
25 the third common law definition of assault: assault by attempt to
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1 cause fear and apprehension of injury. "Assault by attempt to cause
2 fear and apprehension of injury requires specific intent to create
3 reasonable fear and apprehension of bodily injury." *State v.*
4 *Eastmond*, 129 Wash.2d 497, 500, 919 P.2d 577, 578 (1996).

5 "Transferred intent is only required when a criminal statute
6 matches specific intent with a specific victim." *Wilson*, 125 Wash.2d
7 at 219, 883 P.2d at 324. For example, the doctrine of transferred
8 intent is unnecessary to convict a defendant of assaulting both his
9 intended victim and his unintended victim in the first degree because
10 once intent to inflict great bodily harm is established, the mens rea
11 is transferred to any unintended victim. See RCW 9A.36.011; see e.g.,
12 *Wilson*, 125 Wash.2d at 218, 883 P.2d at 323 ("Assault in the first
13 degree [which involves assault by battery] requires a specific intent
14 [to inflict great bodily harm]; but it does not, under all
15 circumstances, require that the specific intent match a specific
16 victim."). Similarly, the doctrine of transferred intent is
17 unnecessary to convict a perpetrator of assaulting an unintended
18 victim in the second-degree because that statute, RCW 9A.36.021(1),
19 does not match specific intent with a specific victim. See RCW
20 9A.36.021; see e.g., *State v. Allen*, 105 Wash.App. 1040, 2001 WL
21 316177 (Div. 1). The second degree assault statute, which includes
22 the common law definition of assault, requires that the perpetrator
23 have the intent to create "in another" "apprehension and fear of
24 bodily injury." RCW 9A.36.021(1). It also requires that the
25 perpetrator create "in another" a "reasonable apprehension and
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1 imminent fear of bodily injury." *Id.* However, this offense does not
2 require that the intended person and the person who suffered the
3 assault be the same person. *Id.*

4 The statutory definitions for criminal assault, which rely on the
5 common law definitions of assault, do not require proof of a specific
6 intent to assault the named victim. See *Wilson*, 125 Wash.2d 212, 883
7 P.2d 320. In other words, once intent to assault another is
8 established, the *mens rea* is transferred to any unintended victim.
9 See *supra*. Thus, if Plaintiffs prove the Officers intended to assault
10 (*i.e.*, intended to create apprehension and fear of bodily injury)
11 those Plaintiffs who were directly sprayed with O.C., the intent
12 transfers to all Plaintiffs who were assaulted (*i.e.*, intended and
13 unintended victims), even though the Officers may not have intended to
14 assault those Plaintiffs who were not directly sprayed with O.C.

15 **CONCLUSION**

16 Upon reconsideration of its Order, the Court determines that the
17 only remaining negligence claims at this stage of the proceedings
18 include Plaintiffs' claims against the individual Defendant Officers.
19 Further, the Court concludes that Plaintiffs' claim that the Officers
20 were negligent in dispersing O.C. spray inside the building is not
21 precluded by the public duty doctrine. Whether the Officers' use of
22 O.C. spray was below the standard of reasonable care and whether such
23 action proximately resulted in damage to Plaintiffs is a question for
24 the jury. However, Plaintiffs' remaining negligence theories are
25 precluded by the public duty doctrine. With respect to Plaintiffs'

1 assault claims that are not barred by the statute of limitations, the
2 Court concludes the doctrine of transferred intent is unnecessary to
3 find the Officers intended to assault those Plaintiffs who were
4 directly sprayed with O.C., as well as those Plaintiffs who were not
5 directly sprayed but suffered secondary effects.

6 **IT IS HEREBY ORDERED** that Defendants' Motion for Reconsideration
7 Re: Court's Order Denying in Part and Granting in Part Defendants'
8 Motion for Summary Judgment Re: Plaintiffs' State Law Claims (**Ct. Rec.**
9 **395**) is **DENIED IN PART AND GRANTED IN PART**.

10 **IT IS SO ORDERED.** The District Court Executive is hereby
11 directed to enter this order and furnish copies to counsel.

12 **DATED** this 6th day of June, 2006.

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14 s/ Fred Van Sickle
Fred Van Sickle
United States District Judge
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